(2)

FILED
JAN 3 1994
OFFICE OF THE CLERK

No. 93-882

In The

Supreme Court of the United States

October Term, 1993

ROBERT G. TILTON,

Petitioner,

vs.

GARY L. RICHARDSON, OLE ANTHONY, HARRY GUETZLAFF, C. TONY WRIGHT, DAVID BURROWS, AND GEORGE A. OTSTOTT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS' GARY L. RICHARDSON, OLE ANTHONY, HARRY GUETZLAFF, C. TONY WRIGHT, DAVID BURROWS, AND GEORGE A. OTSTOTT

FELDMAN, HALL, FRANDEN, WOODARD & FARRIS
JOSEPH R. FARRIS, OBA #2835
Counsel of Record
JODY R. NATHAN, OBA #11685
J. DAVID MUSTAIN, OBA #13132
525 South Main, Suite 1400
Tulsa, OK 74103-4523
Telephone: 913/583-7129
Facsimile: 918/584-3814

Counsel for Respondent Gary L. Richardson

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

34 pp

Dana Bowen
Gary L. Richardson
Richardson, Stoops & Keating
6846 S. Canton, Suite 200
Tulsa, OK 74136-3414
918/492-7674
Fax: 918/493-1925

Attorneys for Gary Richardson

Michael F. Linz
400 Katy Building
701 Commerce Street
Dallas, TX 75202 4518
214/748-1948
Fax: 214-748-9449

William H. Hinkle
320 South Boston Ave.
Tulsa, OK 74103
918/584-6700
Fax: 918/584-6767

Cooperating Attorneys
ACLU of Texas & Oklahoma

Attorneys for Ole Anthony and Harry Guetzlaff

Steven W. Vincent
3314 E. 51st St. Suite 201-B
Tulsa, OK 74135-3527
918/743-3700
Fax: 918-743-3798

Attorney for C. Tony Wright and David Burrows

Martin R. Merritt
Otstott & Associates
3611 Fairmount Street
Dallas, TX 75219
1/800/882-1402
Fax: 214-522-2610

Attorney for George A. Otstott

TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE 3

II. STATEMENT OF THE ISSUE 5

A. THE ALLEGATIONS 5

B. THE RULING 7

III. REASONS FOR DENYING CERTIORARI 8

A. ELEMENTS OF A § 1985(3) CLAIM 9

B. THIS COURT HAS ALREADY DETERMINED THE EXACT ISSUE RAISED BY PETITIONER 14

C. THERE IS NO LEGITIMATE CONFLICT BETWEEN JURISDICTIONS 18

1. *Taylor* is not applicable because it was decided before *Scott* 19

2. The facts in *Taylor* support a finding of invidious class based animus while the facts in the present case do not 19

D. TILTON'S ASSERTION THAT THERE IS STATE ACTION MERELY RESTATES THE MERITS OF TILTON'S CLAIM AND DOES NOT PROVIDE A REASON FOR THIS COURT TO GRANT CERTIORARI 23

E. OTHER LEGITIMATE REASONS EXIST FOR UPHOLDING THE RULINGS OF THE TRIAL COURT AND THE TENTH CIRCUIT 27

IV. CONCLUSION 29

TABLE OF AUTHORITIES

Page

Bray v. Alexandria Women's Health Clinic, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) ..... *passim*

Cantwell v. Connecticut, 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900 (1940) 11

Carpenters v. Scott, 463 U.S. 825, 77 L.Ed.2d 1049, 103 S.Ct. 3352 (1983) 19

Collins v. Hardyman, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253 (1951) 16, 18

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) 28

Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963) 24

Fink v. Sheridan Bank, 259 F.Supp. 899 (W.D. Okl. 1966) 9

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978) 26

Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925) 24

Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971) ..... *passim*

Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 48 S.Ct. 423, 72 L.Ed. 770 (1928) 10

TABLE OF AUTHORITIES – Continued

Page

Lugar v. Edmondson Oil Co, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982) 25

McDonald v. Smith, 472 U.S. 479, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985) 28

Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972) 26

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 26

Paul v. Watchtower Bible and Tract Society, 819 F.2d 875 (9th Cir. 1987), *cert. denied*, 484 U.S. 926 26

Shelley v. Kramer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) 25

Singer v. Wadman, 745 F.2d 606 (10th Cir. 1984) 9

Smith v. McDonald, 895 F.2d 147 (4th Cir. 1990) 28

Taylor v. Gilmartin, 686 F.2d 1346 (10th Cir. 1983) 19, 20, 21

Taylor v. Nichols, 558 F.2d 561 (10th Cir. 1977) ...22, 23

United Broth. of Carpenters & Joiners v. Scott, 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983) *passim*

United States v. Harris, 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290 (1882) 25

United States v. Guest, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966) 25

Wilhelm v. Continental Title Co., 720 F.2d 1173 (10th Cir. 1983) 19

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND MISCELLANEOUS

28 U.S.C. § 1292(b) 2

42 U.S.C. § 1985(3) ..... *passim*

Sup.Ct.R. 10.1 23

Rule 12 of the F.R.C.P 2

Webster's Second International Dictionary 1306 (1954) 21

No. 93-882

In The

Supreme Court of the United States

October Term, 1993

ROBERT G. TILTON,

Petitioner,

vs.

GARY L. RICHARDSON, OLE ANTHONY, HARRY GUETZLAFF, C. TONY WRIGHT, DAVID BURROWS, AND GEORGE A. OTSTOTT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS' GARY L. RICHARDSON, OLE ANTHONY, HARRY GUETZLAFF, C. TONY WRIGHT, DAVID BURROWS, AND GEORGE A. OTSTOTT

This is an action by Robert G. Tilton ("Tilton") against several attorneys and two of Tilton's more outspoken critics in the religious community. Tilton alleges the Respondents conspired with law enforcement officials from Oklahoma and Texas and with ABC News' *Prime Time Live* in order to bring about the general downfall of Tilton's ministry.

The "conspiratorial acts" of which Tilton complains are public statements by some of the Respondents critical of Tilton (a public figure) and allegations contained in lawsuits filed against Tilton and his ministry.

Tilton's Complaint relied on 42 U.S.C. § 1985(3) as the *remedial* vehicle for relief. As diversity jurisdiction was unavailable, this federal statute was also his sole basis for federal jurisdiction. Tilton asserted pendent state law claims of libel and slander, and additionally sought the trial court's equitable power to "enjoin further libelous and slanderous statements."

The Respondents filed motions to dismiss under Rule 12 of the F.R.C.P. Following a hearing on the motions, Tilton's federal claim was dismissed, however, the trial court retained jurisdiction to allow an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Tilton sought the trial court's reconsideration of its dismissal based in part on his proffered Amended Complaint which reasserted that his claim was actionable under § 1985(3). Reconsideration was denied, and Tilton appealed. The Tenth Circuit held that the District Court had jurisdiction over the matter, and that dismissal was proper because Tilton failed to state a claim under § 1985(3).

Neither Tilton's original Complaint, nor his proffered Amended Complaint state a claim upon which relief can be granted. His claims are repugnant to the First Amendment to the United States Constitution – ironically the same amendment he feels provides the substantive basis for the relief he seeks.

I. STATEMENT OF THE CASE

Tilton is a high-profile, evangelical minister. He operated his international television ministry featuring the "Success'N Life" television show from his Word of Faith Outreach Center Church ("Tilton's Church") located just north of Dallas, Texas. Substantial portions of Tilton's daily television broadcasts were devoted to the solicitation of donations from his viewers. A central tenet of Tilton's "prosperity message" is that donations or "vows" are required of his followers to ensure their individual, spiritual, physical, and financial prosperity.

On November 21, 1991, Diane Sawyer, a reporter on ABC Television's *Prime Time Live* aired an investigative report on various evangelists, including Tilton, which questioned whether Tilton was taking money from his followers under false pretenses – both as to the use to which the funds would be put and as to the personal treatment the prayer requests and letters would receive. The *Prime Time Live* report brought the Tilton ministry to the attention of many United States citizens. The people of Texas, where Tilton's church is located, were especially interested in the assertions made against Tilton, and complaints were lodged against Tilton with the Texas Attorney General's office.

The Texas Attorney General investigated Tilton and his church for fraud and misrepresentation. Inspection of the church's financial records under authority of the Texas Deceptive Trade Practices Act was attempted. Rather than disclose the amount of donations Tilton's

church had received, Tilton challenged the Attorney General's power to inspect the church's books. As Tilton was swift to emphasize in his Petition, the federal court which heard the matter chastised the Texas Attorney General for his conduct during the investigation. The court felt the Attorney General should have acted with an eye toward less obtrusive means by which the proper ends could be achieved. What Tilton failed to mention was that the court ruled in favor of the Attorney General on the substantive issue of the right of the Attorney General to inspect the church's financial records, but held the inquiry should have been conducted pursuant to the Texas Non-Profit Corporation Act, under which the Word of Faith Outreach Center was organized. The Texas Attorney General then requested to review the financial records of the Word of Faith Outreach Center. Rather than allow such an inspection, however, the Word of Faith Outreach Center transferred all of its assets to a newly formed sole proprietorship of Tilton's, the Word of Faith Outreach Center Church, thus blocking any inspection of their financial records under the Texas Non-Profit Corporation Act. Conveniently, this was accomplished within days following the Texas Attorney General's request to review the financial records of the Word of Faith Outreach Center.

Due to the seriousness of the charges being made against Tilton, a number of his own followers began to question the legitimacy of Tilton's mission and the wisdom in sending money to him via his church. Some of the Respondent attorneys were contacted by hundreds of Tilton's former followers, requesting they file suits on their behalf. These attorneys declined to represent all but

a handful of putative plaintiffs whose claims presented prima facie cases of extreme and outrageous conduct. Respondent attorneys C. Tony Wright and David Burrows had a client referred to them through a bar association lawyer referral system. As a result, a lawsuit was filed in Texas state court by Wright and Burrows, and several other lawsuits were filed in state and federal courts against Tilton in Oklahoma and Texas by the other attorneys. Tilton filed this lawsuit in an attempt to have a federal court enjoin litigation of the state court proceedings and to enjoin further "libelous and slanderous statements by the Defendants."

II. STATEMENT OF THE ISSUE

The issue in this case is whether an alleged private conspiracy to defame a Christian evangelist is a "constitutional tort." The lower courts, guided by three Supreme Court decisions concerning § 1985(3) correctly held that it was not a constitutional tort, especially where, as here, only economic damages have been alleged. This court should also recognize that the issues raised by petitioner have been considered and decided by this Court and deny certiorari.

A. THE ALLEGATIONS

The basis of the § 1985(3) claim is that the Respondents, (attorneys and lay ministers) conspired to lie about Tilton. As a result of these alleged lies, Tilton complains he is unable to reach as many people with his message as before because not as many people watch him on television. Tilton claims he is not as able to spread his religion.

This is the essence of his claim that he has been deprived of his religious freedom.

In Tilton's Complaint, he alleges the Church's beliefs are based exclusively on the Word of God as revealed in the Holy Scriptures (the Bible) and that prosperity churches, *like other churches*, believe in tithing and giving offerings to the church. Although Tilton claims that "conventional Christianity" does not accept his church's interpretation of Scripture, his beliefs appear to be mainstream in that he believes the faithful will prosper, and that miracles still happen.

The Complaint alleges Respondent conspired to deprive Tilton of his Constitutional right of freedom to exercise his religion by exposing him to public hatred, contempt, ridicule and financial injury in order to influence state action. In Tilton's Amended Complaint, he claims his freedom of religion has been infringed because he does not have as large an audience now, some former church members think he is a fraud, and he has been "distracted" from preaching.

Tilton complains that the Defendants conspired to deprive him of his right to practice his religion by saying derogatory things about him in the press and by causing lawsuits to be filed against his ministry. Tilton alleged that after the *Prime Time Live* broadcast, nine lawsuits were filed against him and the church alleging fraud and emotional distress. He alleged the basis of the claims were that if Tilton "prays and the prayers are not answered to an individual's satisfaction, then Robert Tilton is liable in tort." (Pet. for Cert., p. A-28) Complaint ¶ 14. He claimed the lawsuits were attempts to litigate

ecclesiatical issues. (Pet. for Cert., p. A-29) Complaint ¶ 16. He alleged the attorneys wrongfully solicited clients to sue him, and filed lawsuits which failed to state claims against him and the Church. (Pet. for Cert., p. A-33) Complaint ¶ 28-31. This has allegedly resulted in his ministry being less effective.

He claims the conspiracy resulted in state action because the Texas Attorney General began investigating Tilton. There is no claim, however, the acts of the Texas Attorney General have resulted in a deprivation of Tilton of the equal protection of the laws, or of equal privileges and immunities under the law.

B. THE RULINGS

It was undisputed that 42 U.S.C. § 1985(3) was the sole basis for the court's jurisdiction. In its June 30, 1992 Order, the Trial Court found it was Tilton's economic and commercial interests which were implicated by the alleged actions of the Respondents, and there was no allegation that any of the acts of the Respondents actually impeded Tilton's ability to practice his religion. Further, the court held there was no evidence the Respondents' acts were motivated by religious animus. In its July 9, 1992, Order (on Tilton's Motion to Reconsider), the Trial Court restated that Tilton had failed to show any infringement of his right or ability to practice his religion and that, in substance, it was the deleterious effect on Tilton's economic/commercial interests of which he complained. The Court ruled such interests are not protected by § 1985(3). Additionally, the Court held that Tilton failed to make a colorable showing of state action.

The Tenth Circuit, in affirming the Trial Court, reviewed the record *de novo*. It found that Tilton failed to state a claim for which relief could be granted, inasmuch as the rights Tilton claimed were violated by the alleged conspiracy were not protected against private infringement. These rights included his right to freedom of religion, guaranteed by the First Amendment, his right to pursue his chosen profession, guaranteed by the Fifth and Fourteenth Amendments, and his right to a fair and impartial jury. (Pet. for Cert. p. A-21)

III. REASONS FOR DENYING CERTIORARI

Tilton asks this Court to grant Certiorari to review the state action requirements for a § 1985(3) claim. Notwithstanding Tilton's arguments to the contrary, a review of the pertinent authorities and the Complaint reveals that Tilton does not assert the type of claim that should be or is protected by § 1985(3) (and also reveals that Tilton has recourse for the alleged torts committed by the Respondents in state court); that the only rights which Tilton claims are violated by the alleged conspiracy (his right to freedom of religion and his right to pursue his chosen profession) are protected only against official encroachment (state action) and are not protected against private encroachment; and that Tilton's allegations of official encroachment or state action are insufficient. This Court has already determined that if a purely private conspiracy is alleged, the state action requirement is fulfilled only if the rights allegedly being violated are protected against private encroachment as well as official encroachment. Additionally, there are numerous other

grounds for dismissing Tilton's Complaint. This court should deny Certiorari.

A. ELEMENTS OF A § 1985(3) CLAIM

The elements of a § 1985(3) claim are: 1) a conspiracy; 2) to deprive plaintiff, either directly or indirectly, of the equal protection of the laws or of equal privileges and immunities provided thereunder; 3) an act in furtherance of the conspiracy; and 4) whereby the plaintiff is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). Each element must be pleaded in order to state a claim. Tilton failed to allege any state action, and thus failed to state a claim. In addition, he failed to allege a conspiracy, deprivation of a protected right, and invidious, class-based animus.

A civil conspiracy is the combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. *Fink v. Sheridan Bank*, 259 F.Supp. 899 (W.D. Okla. 1966). It is well established that there can be no "conspiracy" where the acts complained of and the means employed of doing the acts are lawful. *Id.*, *Singer v. Wadman*, 745 F.2d 606 (10th Cir. 1984).

With respect to the element of deprivation of "equal protection under the laws," the Court, in *Griffin*, stated "[t]he language of [of § 1985(3)] requiring an intent to deprive of equal protection or equal privileges and immunities, means that there must be some racial, or

perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102. The *Griffin* Court relied on Representative Shellabarger's statement that the law applied only "to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the animus and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies. . . . " *Id.* at 100. The equal protection clause means that the "rights of all persons must rest upon the same rule under similar circumstances" and that "it applies to the exercise of all the powers of the state which can affect the individual or his property . . . " *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 48 S.Ct. 423, 72 L.Ed. 770 (1928). Thus, in order to state a claim, Tilton must be within a protected class that is being discriminated against and must claim he is unable to practice his religion as freely as other Americans. To state a claim, Tilton must also allege he was deprived of a "right or privilege of a citizen of the United States." In *United Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 836, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983), the court states "it is a very close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause . . . " The court then flatly rejected the notion that § 1985(3) reaches conspiracies motivated by economic or commercial animus. Were it otherwise,

> [T]here would be little basis for concluding that the statute did not provide a cause of action in a

> variety of other situations where one economic group is pitted against another, each having the intent of injuring or destroying the economic health of the other. We think that such a construction to the statute, which is at best only arguable and surely not compelled by either its language or legislative history, should be eschewed and that group actions generally resting on economic motivations should be deemed beyond the reach of § 1985(3). Economic and commercial conflicts, we think, are best dealt with by statutes, federal or state, specifically addressed to such problems, as well as by the general law proscribing injuries to persons and property.

463 U.S. at 839.

With respect to state action, it is helpful to examine the rights that Tilton claims are being violated. The First Amendment states in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . . " The Fourteenth Amendment states in pertinent part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Fourteenth Amendment makes the prohibition found in the First Amendment applicable to the States. *Cantwell v. Connecticut*, 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900 (1940). These Amendments protect Tilton only against interference with his rights by "Congress" and the "States." Tilton, however is not complaining of any

acts of Congress or of a state that deprived him of his freedom of religion.

The Supreme Court has carefully circumscribed the protection of § 1985(3) to prevent it from becoming a general federal tort law as can be seen by the Court's cautious application of the statute. Thus, the Supreme Court has stated that § 1985(3) also requires proof of the following:

> Our precedents establish that in order to prove a private conspiracy in violation of the first clause of § 1985(3), a plaintiff must show, inter alia, (1) that 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action,' *Griffin v. Breckenridge*, 403 U.S. 88, 102, 29 L.Ed.2d 338, 91 S.Ct. 1790 (1971), and (2) that the conspiracy 'aimed at interfering with rights' that are 'protected against private, as well as official, encroachment,' *Carpenters v. Scott*, 463 U.S. 825, 833, 77 L.Ed.2d 1049, 103 S.Ct. 3352 (1983).

Bray v. Alexandria Women's Health Clinic, 113 S.Ct. 753, 758, 122 L.Ed.2d 34 (1993).

In an emotional appeal to this court, Tilton ignores all of these requirements and attempts to leave the impression that, unless he is found to have a claim under § 1985(3), he will be left without recourse for a violation of his "fundamental right to exercise his religion freely." Neither his premise that § 1985(3) is his only recourse nor his assertion that his freedom of religion is being violated is correct. In support of these assertions, Tilton gives a disingenuous example of a conspiratorial mass of right-

wing Christians who act to deny access to the only synagogue in a city, without the aid of any state or Federal authority. Tilton asserts that this is precisely the kind of conspiracy that § 1985(3) was designed to prevent, and that the ruling of the Tenth Circuit leaves them without "cure under the statute, and indeed no cure anywhere else due to the unfortunate twist of fate that the state has not become involved."

Tilton's "example" ignores the possible state claims available to the members of this hypothetical Jewish synagogue, and similarly ignores the state libel and slander claims available to Tilton. It is strikingly similar to *Bray*, which held there was no such claim under § 1985(3) when abortion clinics are blockaded. The example also ignores the clear legislative intent of the drafters of § 1983(3) that the statute not apply to

> [A]ll tortious, conspiratorial interferences with the rights of others. For, though the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, 'that Congress has a right to punish an assault and battery when committed by two or more persons.'

Griffin, 403 U.S. at 100. It is exactly the need to limit the § 1985(3) claim that gives rise to the requirements enunciated by the court in *Griffin*, and by the subsequent courts in *Scott* and *Bray* which preclude Tilton's claim.

B. THIS COURT HAS ALREADY DETERMINED THE EXACT ISSUE RAISED BY PETITIONER

Tilton argues that he presents an issue that was not decided by the court in *Bray*. This attempt to justify an exercise of this Court's power of supervision is without merit and can only be supported by completely ignoring the mandates of *Griffin*, *Scott* and *Bray*. Tilton engages in a semantic fantasy to argue that the issue now before the Court was not decided by *Bray*. He characterizes the issue presented as "whether allegations of a conspiracy between private individuals to deprive a person of his religious freedoms, a 'right or privilege of a citizen of the United States,' are covered by § 1985(3)." The Court, in *Bray*, recognized that a § 1985(3) claim requires an intent to deprive persons of a "right guaranteed against private impairment," *Bray*, 113 S.Ct. at 762, and that the impairment of the right must be a "conscious objective of the enterprise." *Id.* at 764. Thus while *Bray* did not deal with "religious freedoms," its holding that there must be a conspiracy to deprive persons of a "right guaranteed against private impairment" directly addresses the issue as framed by Tilton.

The Amendments that Tilton claims under (the First, Fifth, and Fourteenth Amendments) protect against official encroachment only.

> The Equal Protection Clause of the Fourteenth Amendment prohibits any State from denying any person the equal protection of the laws. The First Amendment, which by virtue of the Due Process Clause of the Fourteenth Amendment now applies to state governments and their officials, prohibits either Congress or a State from

> making any 'law . . . abridging the freedom of speech, . . . or the right of the people to peaceably assemble.'

Scott, 463 U.S. at 831. This observation is equally true of the freedom of religion which is also found in the First Amendment. Moreover, the Supreme Court has only recognized two sources of Congressional power to reach a private conspiracy, the Thirteenth Amendment and the Right to Travel, neither of which are implicated here. *Griffin*, 403 U.S. at 104-106. Thus, it is clear that the precise issue here, i.e., whether the First Amendment right to freedom of religion is protected against purely private encroachment has been answered negatively by *Griffin*, *Scott* and *Bray*.

In a novel argument to circumvent the clear holdings of *Griffin*, *Scott* and *Bray*, Tilton asserts that his rights to freedom of religion and freedom of association do not have their source in the First Amendment, "are neither granted nor established by that amendment," and are, in fact, inherent rights that are possessed by every human and "predate the formation of our government." If this is true, then § 1985(3) cannot provide the vehicle for any remedy sought by Tilton since it protects only against deprivation of rights provided by law. This argument is at odds with *Scott*, and the clear language of § 1985(3). The *Scott* court recognized that the rights protected against by § 1985(3) must come from other enumerated sources, and those enumerated sources were state, Federal Constitutional or federal statutory law. *Scott*, 463 U.S. at 834. Moreover § 1985(3) protects against the deprivation of "any person or class of persons of the equal

protection of the **laws**, or of equal privileges and immunities under the **laws**." (emphasis added.)

The requirement that a § 1985(3) claim be based on a violation of a right granted by the *laws* was also emphasized by this court in *Collins v. Hardyman*, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253 (1951). In rejecting the notion that a conspiracy to interfere with a planned political meeting was actionable under § 1985(3), the court stated:

> Such private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so. Plaintiffs' rights were certainly invaded, disregarded, and lawlessly violated, but neither their rights nor their equality of rights under the law have been, or were intended to be, denied or impaired. Their rights under the laws and to protection of the laws remain untouched and equal to the rights of every other Californian, and may be vindicated in the same way and with the same effect as those of any other citizen. . . .

Id. at 661-662. Tilton does not base his inherent, natural right theory on any law (Constitution or statute), and § 1985(3), by its terms, does not apply to inherent or natural rights. Thus even if Tilton does possess an "inherent right" to freedom of religion, such right is not protected under § 1985(3).

His reliance on the right to "Life, Liberty and the Pursuit of Happiness" as contained in the Declaration of Independence is also insupportable. Tilton does not cite any case which applies § 1985(3) to inherent rights, or, in fact any rights that are not found in the Constitution or in

federal statutes. Tilton's inherent right theory is also defeated by his own Complaint (Pet. for Cert. p. A-61), and indeed his own Petition for Certiorari (Pet. for Cert. pp. 17, 27) wherein he argues that his First and Fourteenth Amendment rights are being violated.

Tilton's Petition for Certiorari presents no question that "has not yet been ruled on," and the Tenth Circuit correctly interpreted not only *Bray*, but also *Griffin* and *Scott*. Tilton is not requesting guidance from this Court on an unanswered question of law, but he is actually requesting this Court to reconsider an issue reviewed within the past eleven months in *Bray*. The only reason that can be discerned from Tilton's brief for this extraordinary request is that he is in disagreement with this Court's rulings in *Bray*, *Griffin* and *Scott* which limit the scope of § 1985(3) to exclude the claims asserted.

Tilton is actually requesting that *Bray* and its predecessors be overruled. Several statements in his brief make it obvious: "The Majority, through their opinion in *Bray*, have seemingly set in concrete the notion that a private conspiracy to violate a 'First Amendment' right cannot be punishable under [§ 1985(3)], in that a "First Amendment" right is only protectable against state interference. This interpretation is unfortunate and incorrect; . . . " (Pet. for Cert. p. 11); "The argument of *Bray*, and the Tenth Circuit's reliance on that argument, that a § 1985(3) private conspiracy cannot reach a 'right that is by definition a right only against state interference,' is therefore flawed." (Pet. for Cert. p. 16). Tilton presents no issue left unanswered by *Bray*, but merely disagrees with *Bray*. This is demonstrated by Tilton's repeated reliance on the dissenting opinions in *Bray* and the fact that he virtually

ignores the six-judge majority on the issue of official encroachment. Furthermore, he mischaracterizes the holding in *Bray*, since this court has previously ruled that § 1985(3) requires either deprivation of a right protected against from private action, or state action. *See*, e.g. *Collins*, *Griffin* and *Scott*.

Tilton provides no compelling reason, either legally or factually, for this court to reconsider the exact issue that was considered in *Bray*. In fact, Tilton would have this Court overrule *Collins*, *Griffin* and *Scott* as well, since each construes § 1985(3) to require the encroachment of a right protected against private infringement where the conspiracy is purely private.

C. THERE IS NO LEGITIMATE CONFLICT BETWEEN JURISDICTIONS

Tilton also attempts to justify this Court's review of an issue that it has already decided by "manufacturing" a conflict between the jurisdictions. This attempt is unavailing because even if there is a conflict among the jurisdictions as to "whether a conspiracy between private individuals to deny freedom of religion is actionable under 42 U.S.C. § 1985(3)," this conflict has been resolved by this Court in *Scott* and *Bray*, both of which were decided after all of the cases relied on by Tilton for this proposition.

1. *Taylor* is not applicable because it was decided before *Scott*

The gist of this argument is that the Tenth Circuit's decision in this case is in conflict with its decision in *Taylor v. Gilmartin*, 686 F.2d 1346 (10th Cir. 1983). *Taylor*, however, provides no support for Tilton whatsoever, both because of the fact-specific ruling in *Taylor* and the time period in which it was decided.

The *Taylor* case was decided in 1982, before the Supreme Court decided the seminal § 1985(3) case, *Carpenters v. Scott*, wherein the Court explicitly required that a private conspiracy be "aimed at interfering with rights" that are "protected against private, as well as official, encroachment," in order that a claim be stated under § 1985(3). *Scott*, 463 U.S. at 833. That court also recognized limits on the scope of plaintiffs who have standing to sue under § 1985(3). "It is a close question whether Section 1985(3) was intended to reach any class-based animus other than animus against Negroes, and those who championed their cause." *Id.* at 836. After *Scott*, the Tenth Circuit considered the scope of a § 1985(3) claim and declined to extend § 1985(3) to handicapped individuals as they did not form a cognizable class. *Wilhelm v. Continental Title Co.*, 720 F.2d 1173 (10th Cir. 1983).

2. The facts in *Taylor* support a finding of invidious class based animus while the facts in the present case do not

The *Taylor* court specifically found the "invidiously discriminatory animus" required by *Griffin*, which is not

present in this case. *Taylor* involved religious deprogrammers who obtained an erroneous court order granting them protective custody over a 21-year-old member of a Catholic religious order. The deprogrammers transported the believer from Oklahoma City to Akron, Ohio, where he was held in a motel room against his will for one week, then transferred to Arizona where he escaped. During his confinement, the deprogrammers attempted to coerce the believer into abandoning his religious beliefs by means of various acts of brainwashing and torture. The believer was beaten, yelled at, threatened with extended incarceration in jail, threatened with shock treatment, deprived of sleep, doused with water, had lights shined in his eyes, and was stripped naked, shaven and had his hair cut off. *Taylor*, 686 F.2d at 1349.

The Tenth Circuit stated:

> Is there a class-based invidious discrimination under the meaning of the *Griffin* decision? It should be emphasized that these defendants are professionals. They perform this service for money and they spend a significant amount of time on it. The record shows that their conduct is odious and has the effect of depriving the victim of important rights – his liberty, his freedom, his right to practice his religion, among other rights.

Id.

The holding by the Tenth Circuit is clearly a factually specific, result-oriented, teleological finding which should not be applied to the facts in this case. Both the Respondents' acts and the Petitioner's claims distinguish *Taylor* from this case. First, the nature of the conduct by

the Defendants in *Taylor* is far more odious than is alleged by Tilton. Tilton was not subjected to any direct coercion as was Mr. Taylor. Tilton was not physically restrained or injured, or deprived of any opportunity to exercise his religion as Taylor was.

The *Taylor* court applied § 1985(3) to instances involving *physical* injury and *actual physical* restraint of the free exercise of the plaintiff's religion, along with forced interstate travel. Taylor was an individual member of a religious sect who was kidnapped, tortured and coerced for the purpose of renouncing his religious beliefs. The Tenth Circuit would not likely have stretched the parameters of § 1985(3) had the behavior of the defendants not been so clearly demonstrative of class-based invidious discrimination. The *Taylor* case should be recognized as the result-oriented holding that it is, and not be applied to a set of facts which are far afield from those the Tenth Circuit was reviewing.

In contrast, all Tilton can and has alleged is that the co-Respondents libeled and/or slandered him and/or reported his activities to the authorities which caused a reduction in the donations made to his church. The alleged acts by the Respondents were not invidious. The Supreme Court has defined invidious as, "tending to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating." *Bray*, 113 S.Ct. at 762, (citing *Webster's Second International Dictionary* 1306 (1954)). Tilton does not and cannot allege that the facially legitimate claims against him are a subterfuge for a secret religious animus on the part of the Respondents.

The Respondents' acts were reasonably related to a legitimate purpose. Richardson is an attorney who has sued Tilton under numerous allegations of fraud and intentional infliction of emotional distress. An attempt by an attorney to seek legal recompense for aggrieved citizens should hardly be considered irrational or illegitimate. In *Taylor v. Nichols*, 558 F.2d 561 (10th Cir. 1977), the court held that misuse of state process as a result of an improper appointment of a special prosecutor, and the prosecution of a meritless criminal action was ***not*** a constitutional violation. *The acts of filing a claim and testifying at trial do not constitute state action. Id.* at 564. These are private acts. Further, the plaintiff failed to make any showing that he was denied equal protection of the laws. There was no showing that others had not been prosecuted in similar circumstances or that groups other than police officers have not been so prosecuted.

Respondents Anthony and Guetzlaff have investigated Tilton because they feel he is defrauding his followers concerning the use of their donations. The *Prime Time Live* expose was based on the premise that Tilton takes money from people who cannot afford to contribute and uses the money to support a lavish lifestyle. Freedom of the press to investigate public figures is a legitimate end. Tilton has not and cannot allege that the accusations against him are discriminatory in any way. He has not and cannot claim the Respondents would not sue and speak out against his behavior if he were a Moonie, atheist, Baptist or agnostic. In fact, Tilton is only one of several television evangelists who were featured in the *Prime Time Live* report.

Despite its allegations of animus against "prosperity churches," the Complaint makes it clear the Respondents are not motivated by Tilton's religious message, but by his secular acts. Tilton has shown neither the requisite level of invidious action, nor animus motivated by his religious beliefs. Thus, the present case is completely distinguishable from *Taylor*. There was invidious class-based animus in *Taylor*, and there is no invidious class-based animus here. Tilton's assertion that the Tenth Circuit's decision in this case and its decision in *Taylor* are at odds is simply insupportable.

D. TILTON'S ASSERTION THAT THERE IS STATE ACTION MERELY RESTATES THE MERITS OF TILTON'S CLAIM AND DOES NOT PROVIDE A REASON FOR THIS COURT TO GRANT CERTIORARI

Tilton makes a two part argument in his Petition for Certiorari: 1) that state action is unnecessary to his claim even if it is merely a private conspiracy; and 2) that his Complaint alleges a conspiracy which "influences" the state, and therefore states a claim under § 1985(3). Tilton's argument is "fact-based" and does not provide any reason for this Court to review the findings of the Tenth Circuit and the Trial Court. "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Sup.Ct.R. 10.1. While Tilton suggests, erroneously, that there is a basis for a grant of certiorari on his first argument, he does not even attempt to argue that there is a "special and important reason" to consider his second argument which merely rehashes the merits of his case already rejected by the lower courts.

Tilton argues that under the reasoning in *Scott*, a private conspiracy that is aimed to influence the activity of the state is actionable under § 1985(3). *Scott*, 463 U.S. at 830 ("an alleged conspiracy to infringe First Amendment rights is not a violation of § 1985(3) unless it is proved that the State is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the State."). Tilton's reading of *Scott* was rejected by the Court in *Bray*, when it noted a specific requirement that the conspiracy be aimed at interfering "with rights that are protected against private, as well as official encroachment." *Bray*, 113 S.Ct. at 764. Thus, under *Bray*, an intent to influence the activity of the state is insufficient to state a claim under § 1985(3) without a conspiracy aimed at interfering with rights that are protected against private encroachment. Tilton's assertion that "*Bray* does not address the situation here" is intellectually dishonest. *Bray* states that "in order to prove a private conspiracy in violation of the first clause of § 1985(3), a plaintiff must show, inter alia, . . . that the conspiracy 'aimed at interfering with rights' that are protected against private, as well as official, encroachment . . . " *Id.* With this argument, too, Tilton is requesting this Court to overrule its recent ruling in *Bray*.

Additionally, Tilton's argument that there is sufficient state action to prevent the asserted conspiracy from being a purely private one is without merit. The First Amendment guarantees freedom from interference by the federal government. By incorporation into the due process clause of the Fourteenth Amendment, these guarantees also run against the state. *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925); *Edwards v. South*

Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963). The Fourteenth Amendment erects no shield against merely private conduct, however discriminating or wrongful. *Shelley v. Kramer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). The United States Supreme Court held the criminal counterpart of § 1985(3) unconstitutional because such a law, directed exclusively against the action of private persons, without reference to the laws of the State or their administration by its officers is not warranted by any clause in the Fourteenth Amendment. *United States v. Harris*, 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290 (1882). Even in *United States v. Guest*, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966), the court notes that the Fourteenth Amendment protects the individual against state action, not wrongs by individuals. Clearly, there are Constitutionality problems with § 1985(3) if it sweeps as broadly as Tilton claims. He cites no authority which permits the due process clause to reach a purely private conspiracy.

In *Lugar v. Edmondson Oil Co*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), the plaintiff brought a § 1983 claim as a result of a prejudgment attachment. The Supreme Court distinguishes between "state action" and the "color of state law" noting that state action is required for a claim to be actionable under the First and Fourteenth Amendments. The distinction is only applicable where, as here, the defendant is not a state official. The plaintiff claimed that a private party defendant violated his due process rights by abusing or misusing attachment procedures and that the procedure was unconstitutional. *The court stated that there is no state action where the defendants abuse the courts or the laws. Id.* at 2756. An action

instituted by a private party, without more, is not state action. Under this holding, the filing of lawsuits by private parties can not be "state action." See also, *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978).

Moreover, the government action must relate to the discriminatory practices alleged. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972). Governmental decisions unconnected with the discriminatory acts are insufficient for "state action." Here, the only "governmental action" was an attempt to get the financial records of Tilton's church. The Texas Attorney General was held entitled to inspect the records, even though the attempt was made under the wrong statute. Moreover, because Tilton changed the organizational basis of his church (from non-profit corporation to sole proprietorship), the Attorney General never received access to Tilton's books and certainly was never able to "close down" Tilton's church.

The cases Tilton relies on do not support his assertion that there is "state action" alleged in his Complaint. Tilton claims that state action may arise from filing of lawsuits, citing *Paul v. Watchtower Bible and Tract Society*, 819 F.2d 875 (9th Cir. 1987), *cert. denied*, 484 U.S.926. Suing a religious figure for fraud does not constitute state action. *Watchtower* merely holds that the imposition of damages under state law may constitute state action. In this case there has been no imposition of damages under state law, and no action by any court. As noted, the Supreme Court has rejected the notion that state action results from the use of the courts. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) also does not support

Tilton's claim. Although "a state court's application of state law in a way that impinges First Amendment rights" may be state action, that is not what we have here. Tilton's Complaint does not contain a single allegation that any court has applied state law and infringed on his rights. His allegations are rather that his rights have been affected by the *mere filing of a lawsuit*. Such an act does not constitute state action.

E. OTHER LEGITIMATE REASONS EXIST FOR UPHOLDING THE RULINGS OF THE TRIAL COURT AND THE TENTH CIRCUIT

Tilton's Complaint is deficient in each of the other elements necessary to a § 1985(3) claim. Tilton does not come within the carefully circumscribed protection of § 1985(3). Tilton, as a minister of a prosperity church, does not belong to any protected class. Moreover, Tilton has not been deprived of his rights to freedom of religion. He complains merely that the size of his viewing audience is diminished and that his effectiveness as a minister is impaired. In fact, he is free to continue to practice his religion and has done so. The only real injury Tilton alleges is economic, through reduction of vows (donations) to his church. Such economically motivated conspiracies are not protected by § 1985(3), *Scott* 463 U.S. at 839, even if Tilton had standing to sue for such reductions in his own name.

Lastly, Tilton's right to freedom of religion must be considered in conjunction with the First Amendment rights of the Respondents. The right to petition the government is also guaranteed by the First Amendment. This

right is paramount, even when asserted by a group or association in a concerted effort to destroy competition by exerting influence on the government. See, e.g., *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), where the court ruled that a publicity campaign to influence government action is political activity, noting that:

> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.

365 U.S. at 143, 144.

In *McDonald v. Smith*, 472 U.S. 479, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985), the court states that the right to petition the government includes the right to file lawsuits. This right does not include the right to defame. *Smith v. McDonald*, 895 F.2d 147 (4th Cir. 1990). Presumably, defamation, if actionable, may be pursued in the state courts. First Amendment rights are equal. Tilton may not claim that his right to freely practice his religion is superior to the defendants rights to petition the government, or to speak freely.

IV. CONCLUSION

Tilton has provided no reason for this Court to review the issues he has presented. *Bray*, properly applied, is completely dispositive of his claims. To state a § 1985(3) claim against a private conspiracy, which Tilton attempts to do, Tilton must allege infringement of a right protected against *private infringement*. The First, Fifth, and Fourteenth Amendments do not provide rights that are protected against private infringement. Moreover, the conduct complained of by Tilton does not constitute invidious discriminatory animus against a protected class. Tilton is attempting to use § 1985(3) as a means of asserting a general tort claim in federal court which has been disapproved of by this Court. "A burglar does not violate the Fourth Amendment, for example, nor does a mugger violate the Fourteenth." *Bray*, 113 S.Ct. at 774. Similarly, Tilton's allegations of libel and slander do not constitute a claim under § 1985(3). Tilton's Petition for Certiorari should be denied.

Respectfully submitted,

FELDMAN, HALL, FRANDEN,
WOODARD & FARRIS
JOSEPH R. FARRIS, OBA #2835
Counsel of Record
JODY R. NATHAN, OBA #11685
J. DAVID MUSTAIN, OBA #13132
525 South Main, Suite 1400
Tulsa, OK 74103-4523
Telephone: 918/583-7129
Facsimile: 918/584-3814

Counsel for Respondent
Gary L. Richardson

[Additional Counsel Listed On Inside Cover]